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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUL 28 2020

SEAN F. McAVOY, CLERK
DEPUTY
SPOKANE, WASHINGTON

9 UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES OF AMERICA,

12 Plaintiff,

Case No.: 2:19-CR-00145-RHW

13 v.

Plea Agreement

14 JESSE MCKAY,

15 Defendant.

16 Plaintiff, United States of America, by and through William D. Hyslop, United
17 States Attorney for the Eastern District of Washington, and Richard R. Barker,
18 Assistant United States Attorney for the Eastern District of Washington, and
19 Defendant JESSE MCKAY and Defendant's counsel, Nick Vieth and Justin Lonergan,
20 agree to the following Plea Agreement:

21 1) Guilty Plea and Maximum Statutory Penalties:

22 Defendant, JESSE MCKAY, by and through this Plea Agreement and pursuant
23 to CARES Act § 15002(b)(2), Pub. L. No. 116-136 (H.R. 748) (eff. March 27, 2020),
24 and General Order No. 20-101-3 (E.D.Wa. Mar. 30, 2020), expressly waives his right
25 to be physical present, *see* Fed. R. Crim. P. 43(a), and consents to appear by video
26 teleconferencing and agrees to plead guilty to Count 2 of the Second Superseding
27 Indictment filed on June 16, 2020, charging Defendant with Assault Resulting in
28 Serious Bodily Injury in Indian Country in violation of 18 U.S.C. §§ 113(a)(6), 1153.

1 Defendant understands that this is a Class C Felony, which carries a maximum penalty
 2 of not more than a ten-year term of imprisonment; a fine not to exceed \$250,000; not
 3 more than a 3-year term of supervised release; restitution; and a \$100 special penalty
 4 assessment.

5 Defendant understands that a violation of a condition of supervised release
 6 carries an additional penalty of re-imprisonment for all or part of the term of
 7 supervised release without credit for time previously served on post-release
 8 supervision.

9 2) The Court is Not a Party to the Agreement:

10 The Court is not a party to this Plea Agreement and may accept or reject this
 11 Plea Agreement. Sentencing is a matter that is solely within the discretion of the
 12 Court. Defendant understands that the Court is under no obligation to accept any
 13 recommendations made by the United States and/or by Defendant; that the Court will
 14 obtain an independent report and sentencing recommendation from the U.S. Probation
 15 Office; and that the Court may, in its discretion, impose any sentence it deems
 16 appropriate up to the statutory maximum stated in this Plea Agreement.

17 Defendant acknowledges that no promises of any type have been made to Defendant
 18 with respect to the sentence the Court will impose in this matter. Defendant
 19 understands that the Court is required to consider the applicable sentencing guideline
 20 range, but may depart upward or downward under the appropriate circumstances.

21 Defendant also understands that should the sentencing judge decide not to
 22 accept any of the parties' recommendations, that decision is not a basis for
 23 withdrawing from this Plea Agreement or a basis for withdrawing this plea of guilty.

24 3) Waiver of Constitutional Rights:

25 Defendant understands that by entering this plea of guilty Defendant is
 26 knowingly and voluntarily waiving certain constitutional rights, including:

- 27 a) The right to a jury trial;
- 28 b) The right to see, hear and question the witnesses;

- c) The right to remain silent at trial;
- d) The right to testify at trial; and
- e) The right to compel witnesses to testify.

While Defendant is waiving certain constitutional rights, Defendant understands the retains the right to be assisted through the sentencing and any direct appeal of the conviction and sentence by an attorney, who will be appointed at no cost if Defendant cannot afford to hire an attorney. Defendant also acknowledges that any pretrial motions currently pending before the Court are waived.

4) Elements of the Offense:

The United States and Defendant agree that in order to convict Defendant of Assault Resulting in Serious Bodily Injury, in violation of §§ 113(a)(6), 1153, the United States would have to prove beyond a reasonable doubt the following elements:

First, on or about July 17, 2019, Defendant assaulted C.A.M. by intentionally striking him;

Second, as a result, C.A.M. suffered serious bodily injury;

Third, the assault took place within the external boundaries of the Confederated Tribes of the Colville Reservation and on trust land;

Fourth, Defendant is an Indian and an enrolled member; and

Fifth, the Confederated Tribes of the Colville Reservation is a federally recognized tribe.

5) Factual Basis and Statement of Facts:

The United States and Defendant stipulate and agree that the following facts are accurate; that the United States could prove these facts beyond a reasonable doubt at trial; and these facts constitute an adequate factual basis for Defendant's guilty plea. This statement of facts does not preclude either party from presenting and arguing, for sentencing purposes, additional facts which are relevant to the guideline computation or sentencing, unless otherwise prohibited in this agreement.

1 On or about July 17, 2019, JESSE MCKAY (MCKAY), an enrolled member of
2 the Colville Confederated Tribes, assaulted his brother, C.A.M., by striking C.A.M. in
3 the face in Nespelem, Washington, within the external boundaries of the Colville
4 Reservation. According to C.A.M., MCKAY struck him in the face while C.A.M.
5 was staying at his mother's home. After the assault, C.A.M. ran to the neighbors for
6 help.

7 Following the assault, C.A.M. was treated at Coulee Medical Center. Medical
8 personnel observed C.A.M.'s eye was nearly swollen shut, and he had a five
9 centimeter laceration on his right cheek bone and a one centimeter laceration on the
10 right side of his nose. A CT scan showed that C.A.M.'s nose was broken.

11 6) The United States Agrees:

12 a) Dismissal(s):

13 At the time of sentencing, the United States agrees to move to dismiss Counts 1
14 and 3 of the Second Superseding Indictment dated June 16, 2020. Count 1 charges
15 Defendant with Assault with a Dangerous Weapon in Indian Country, in violation of
16 18 U.S.C. §§113(a)(3). Count 3 alleges Sexual Abuse in violation of 18 U.S.C. §§
17 2242(2), 2246(2)(B). With respect to Count 3, J.E.G., a former inmate at the Spokane
18 County Jail, alleged that MCKAY assaulted him at the jail and agree to cooperate in
19 the prosecution against MCKAY. The United States has agreed not to pursue this
20 charge based on MCKAY's acceptance of responsibility for the physical assault of
21 C.A.M.

22 b) Not to File Additional Charges:

23 The United States Attorney's Office for the Eastern District of Washington
24 agrees not to bring any additional charges against Defendant based upon information
25 in its possession at the time of this Plea Agreement and arising out of Defendant's
26 conduct involving illegal activity charged in the Second Superseding Indictment,
27 unless Defendant breaches this Plea Agreement any time before or after sentencing.
28 This Plea Agreement is binding only upon the United States Attorney's Office for the

1 Eastern District of Washington, and cannot bind other federal, state or local
 2 authorities, including Spokane County or the Confederated Tribes of the Colville
 3 Reservation.

4 7) United States Sentencing Guideline Calculations:

5 Defendant understands and acknowledges that the United States Sentencing
 6 Guidelines (hereinafter "U.S.S.G.") are applicable to this case and that the Court will
 7 determine Defendant's applicable sentencing guideline range at the time of
 8 sentencing.

9 a) Base Offense Level:

10 The United States and Defendant agree that the base offense level for Assault
 11 Resulting in Serious Bodily Injury in violation of 18 U.S.C. §§ 113(a)(6), 1153, is 14.
 12 See U.S.S.G. §§ 2A2.2(a).

13 b) Specific Offense Characteristics:

14 The United States and the Defendant agree that the assault involved serious
 15 bodily injury, adding an additional 5 levels. See U.S.S.G. § 2A2.2(b)(3)(B). The
 16 United States and the Defendant have not reached an agreement with respect to
 17 whether a dangerous weapon was used or whether the Defendant obstructed or
 18 impeded the administration of justice.

19 c) Acceptance of Responsibility:

20 If Defendant pleads guilty and demonstrates a recognition and an affirmative
 21 acceptance of personal responsibility for the criminal conduct; provides complete and
 22 accurate information during the sentencing process; does not commit any obstructive
 23 conduct; accepts this Plea Agreement; and enters a plea of guilty no later than October
 24 29, 2019, the United States will move for a three (3) level downward adjustment in the
 25 offense level for Defendant's timely acceptance of responsibility, pursuant to U.S.S.G.
 26 §3E1.1(a) and (b).

27 Defendant and the United States agree that the United States may at its option
 28 and upon written notice to Defendant, not recommend a three (3) level downward

1 reduction for acceptance of responsibility if, prior to the imposition of sentence,
 2 Defendant is charged or convicted of any criminal offense whatsoever or if Defendant
 3 tests positive for any controlled substance.

4 d) Adjustments found in the Presentence Investigation Report

5 The parties agree that they are free to advocate for or against any U.S.S.G.
 6 upward or downward adjustments found to apply in the Presentence Investigation
 7 Report that have not otherwise been contemplated or addressed in this Plea
 8 Agreement.

9 e) Criminal History:

10 The United States and Defendant understand that Defendant's criminal history
 11 computation is tentative and that ultimately Defendant's criminal history category will
 12 be determined by the Court after review of the Presentence Investigative Report. The
 13 United States and Defendant have made no agreement and make no representations as
 14 to the criminal history category, which shall be determined after the Presentence
 15 Investigative Report is completed.

16 8) Departures and Incarceration:

17 The Defendant and the United States understand and acknowledge that, at
 18 sentencing, they are free to make whatever sentencing recommendations for whatever
 19 reasons they deem are appropriate. That is, the United States and the Defendant are
 20 free to seek an upward or a downward departure from the applicable sentencing
 21 guideline range.

22 9) Criminal Fine:

23 The parties agree to recommend the Court impose no criminal fine.

24 10) Supervised Release:

25 The United States and Defendant agree to recommend that the Court impose a
 26 3-year term of supervised release to include the following special conditions, in
 27 addition to the standard conditions of supervised release:
 28

1 a) that Defendant participate and complete such drug testing and drug treatment
2 programs as the Probation Officer directs; and

3 b) that Defendant complete mental health evaluations and treatment, including
4 taking medications prescribed by the treatment provider. Defendant shall allow
5 reciprocal release of information between the Probation Officer and the treatment
6 provider. Defendant shall contribute to the cost of treatment according to Defendant's
7 ability.

8 c) that Defendant's person, residence, office, vehicle, and belongings are
9 subject to search at the direction of the Probation Officer, upon a finding of reasonable
10 suspicion.

11 11) Restitution:

12 Defendant agrees to pay restitution as ordered under the Mandatory Victim
13 Restitution Act. The parties hereby agree pursuant to this Plea Agreement that any
14 interest on this restitution amount should be waived. The parties agree the Court will
15 set a payment schedule based on Defendant's financial circumstances. See 18 U.S.C. §
16 3664(f)(2), (3)(A). Pursuant to this plea agreement, Defendant agrees to pay any court
17 ordered restitution to both C.A.M and J.E.G.

18 12) Mandatory Special Penalty Assessment:

19 Defendant agrees to pay the \$100 mandatory special penalty assessment to the
20 Clerk of Court for the Eastern District of Washington, at or before sentencing,
21 pursuant to 18 U.S.C. § 3013 and shall provide a receipt from the Clerk to the United
22 States before sentencing as proof of this payment.

23 13) Payments While Incarcerated:

24 If Defendant lacks the financial resources to pay the monetary obligations
25 imposed by the Court, Defendant agrees to earn the money to pay toward these
26 obligations by participating in the Bureau of Prisons' Inmate Financial Responsibility
27 Program.

28 14) Appeal Rights:

Defendant understands that he has a limited right to appeal or challenge the conviction and sentence imposed by the Court. Defendant hereby expressly waives his right to appeal his/her conviction and the sentence the Court imposes, including any restitution order. Defendant further expressly waives his right to file any post-conviction motion attacking his conviction and sentence, including a motion pursuant to 28 U.S.C. § 2255, except one based upon ineffective assistance of counsel based on information not now known by Defendant and which, in the exercise of due diligence, could not be known by Defendant by the time the Court imposes the sentence.


15) Integration Clause:

United States and Defendant acknowledge that this document constitutes entire Plea Agreement between the United States and Defendant, and no other promises, agreements, or conditions exist between the United States and Defendant concerning the resolution of the case. This Plea Agreement is binding only upon the United States Attorney's Office for the Eastern District of Washington, and cannot bind other federal, state or local authorities. The United States and Defendant agree that this agreement cannot be modified except in a writing that is signed by the United States and Defendant.

Approvals and Signatures

Agreed and submitted on behalf of the United States Attorney's Office for the Eastern District of Washington.

William D. Hyslop
United States Attorney


Richard R. Barker
Assistant U.S. Attorney

7/16/2020
Date

I have read this Plea Agreement and have carefully reviewed and discussed every part of the agreement with my attorney. I understand and voluntarily enter into

1 this Plea Agreement. Furthermore, I have consulted with my attorney about my
2 rights, I understand those rights, and I am satisfied with the representation of my
3 attorney in this case. No other promises or inducements have been made to me, other
4 than those contained in this Plea Agreement and no one has threatened or forced me in
5 any way to enter into this Plea Agreement. I am agreeing to plead guilty because I am
6 guilty.

7 Jesse McKay
8 JESSE MCKAY
9 Defendant

7-14-2020
Date

10 I have read the Plea Agreement and have discussed the contents of the
11 agreement with my client. The Plea Agreement accurately and completely sets forth
12 the entirety of the agreement between the parties. I concur in my client's decision to
13 plead guilty as set forth in the Plea Agreement. There is no legal reason why the
14 Court should not accept Defendant's plea of guilty.

15 Nick Vieth
16 Nick Vieth
17 Justin Lonergan
18 Attorneys for Defendant
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7/14/2020
Date